Jurutera Consultant (SEA) Sdn Bhd & Ors v Eddie Lee Kim Tak & Ors

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO B-02-526 OF 1998

LAMIN PCA, GOPAL SRI RAM AND AHMAD FAIRUZ JJCA

19 SEPTEMBER 1998

Civil Procedure *— Appeal — Jurisdiction of appellate court — Respondents obtained summary judgment based on settlement agreement with appellants — Agreement that High Court decision shall be final, conclusive and binding — Both parties undertook not to appeal against decision — Whether agreement enforceable — Whether jurisdiction of appellate court may be precluded — Whether issue of stay arose*

Contract *— Illegality — Agreement to preclude right of appeal — Whether valid and enforceable*

The appellants sought to stay all proceedings under, and the execution of, a judgment entered summarily against them in the High Court pending an appeal against that judgment. The action by the respondents against the appellants was based on an agreement ('the settlement agreement') contained in the first appellant's letter. The terms set out in that letter were accepted by the respondents. The settlement agreement sought to resolve to a finality all disputes forming the subject matter of several suits brought by the parties in different courts. The appellants contended that there were merits in the appeal because the trial judge was wrong in holding that there were no triable issues. However, the respondents submitted that para A(13) of the settlement agreement provided that both parties had agreed that the decision of the High Court shall be final and conclusive and binding on the parties, and that the parties further undertook not to appeal against the High Court decision. On appeal, the court had to decide whether para A(13) of the settlement agreement was valid and enforceable, and whether there arose a question of a stay pending the outcome of an appeal.

Held, dismissing the application:

Paragraph A(13) was a perfectly valid and enforceable agreement. It had the effect of precluding this court from entertaining the appeal. In the absence of a valid appeal, no question of a stay pending the outcome of an appeal may arise under s 44 of the Courts of Judicature Act 1964. A right of appeal, though a creature of statute, is a substantive right. Like any other valuable right, it may form the subject matter of a contract and may be bargained away. Actual or potential litigants may therefore agree that the decision of a court of first instance shall be final and that neither of them shall appeal against it. This is in keeping with the doctrines of freedom and sanctity of contract (see pp 383H and 384D–E).

[Bahasa Malaysia summary

Perayu-perayu memohon untuk penggantungan semua prosiding di bawah dan pelaksanaan suatu penghakiman yang dimasukkan secara terus terhadap mereka di Mahkamah Tinggi sementara menunggu penyelesaian rayuan terhdadap penghakiman itu. Tindakan oleh penentang-penentang terhadap perayu-perayu adalah berdasarkan suatu perjanjian ('perjanjian penyelesaian tersebut') yang termaktub dalam surat perayu pertama. Terma yang dinyatakan dalam surat itu telah diterima oleh penentang-penentang. Perjanjian penyelesaian tersebut berhasrat menyelesaikan secara muktamad segala pertikaian yang membentuk hal perkara beberapa guaman yang dibawa oleh pihak-pihak di mahkamah berlainan. Perayu-peryau menghujahkan bahawa terdapat merit dalam rayuan kerana hakim perbicaraan adalah salah dalam memutuskan bahawa tiada isu yang boleh dibicarakan. Namun demikian, penentang-penentang menghujahkan bahawa perenggan A(13) perjanjian penyelesaian tersebut memperuntukkan bahawa kedua-dua pihak telah bersetuju bahawa keputusan Mahkamah Tinggi haruslah terakhir dan muktamad dan mengikat atas pihak-pihak, dan bahawa pihak-pihak seterusnya mengakujanji untuk tidak merayu terhadap keputusan Mahkamah Tinggi. Atas rayuan, mahkamah harus memutuskan sama ada perenggan A(13) perjanjian penyelesaian tersebut adalah sah dan boleh dikuatkuasakan, dan sama ada timbul persoalan mengenai penggantungan sementara menunggu penyelesaian suatu rayuan.

Diputuskan, menolak permohonan:

Perenggan A(13) merupakan perjanjian yang sememangnya sah dan boleh dikuatkuasakan. Ia mempunyai kesan mengecualikan mahkamah ini daripada melayan rayuan. Dalam ketiadaan rayuan yang sah, tiada persoalan mengenai penggantungan sementara menunggu penyelesaian suatu rayuan boleh timbul di bawah s 44 Akta Mahkamah Kehakiman 1964. Hak untuk merayu, walaupun suatu ciptaan statut, merupakan hak substantif. Seperti mana-mana hak bernilai yang lain, ia boleh membentuk hal perkara kontrak dan boleh dilepaskan. Oleh itu, litigan-litigan atau bakal litigan boleh bersetuju bahawa keputusan mahkamah pertama haruslah muktamad dan tidak satu pun daripada mereka boleh merayu terhadapnya. Ini mematuhi doktrin-doktrin kebebasan dan kesucian kontrak (lihat ms 383H dan 384D–E).]

Notes

For a case on jurisdiction of appellate court, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) para 659.

For cases on illegality, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 2394–2488.

Cases referred to

Anant Das v Ashburner & Co (1876) ILR 1 All 267 (refd)
Kedarnath v Sitaram AIR 1969 Bom 221 (refd)
Lim Phin Khian v Kho Su Ming [1996] 1 MLJ 1 (refd)
Moonshee Amir Ali v Maharanee Inderjeet Singh (1871–2) 14 Moo Ind App 203 (refd)
Protap Chunder Dass v Arathoon (1882) ILR 8 Cal 455 (refd)
Rameshwardas v New Jooria Bazar Sugar Co AIR 1926 Sind 202 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 44

Appeal from: Civil Suit No 22–785 of 1998 (High Court, Shah Alam)

YT Ling (*Lee Ling & Partners*) for the appellants.
Hj Sulaiman Abdullah (*Lee Chan Leong* and *Jasmine Loo* with him) (*Chan Leong & Co*) for the respondents.

Gopal Sri Ram JCA: This is an application by which the appellants sought to stay all proceedings under, and the execution of, a judgment entered summarily against them on a summons for judgment by the High Court at Shah Alam on 2 September 1998 pending an appeal against that judgment. The action by the respondents against the appellants is based on an agreement contained in the first appellant's letter dated 6 May 1998. The terms set out in that letter were accepted by the respondents on 6 May 1998. The agreement, which I shall for convenience refer to as 'the settlement agreement' seeks to resolve to a finality all disputes forming the subject matter of several suits brought by the parties in different courts. Among the main contentions in support of the application was the argument that there were merits in the appeal because the learned judge was wrong in holding that there were no triable issues.

During submissions, however, the attention of this court was drawn by counsel for the respondent to a term in the settlement agreement which I think places an insurmountable obstacle in the path of the appellants. It is item A(13). It reads:

> Both parties agreed that the decision of the High Court shall be final and conclusive and binding on the parties. The parties further undertake not to appeal against the High Court decision.

This, in my view, is a perfectly valid and enforceable agreement. It has the effect of precluding this court from entertaining the appeal. And absent a valid appeal, no question of a stay pending the outcome of an appeal may arise under s 44 of the Courts of Judicature Act 1964. I notice that similar agreements have come before the courts of India and have been consistently upheld.

The earliest case in point was decided in 1871 by the Judicial Committee of the Privy Council in *Moonshee Amir Ali v Maharanee Inderjeet Singh* (1871–2) 14 Moo Ind App 203 before the coming into force of the

Indian Contract Act 1872 on which our Contracts Act of 1950 is based. There, the appellant had, notwithstanding an agreement not to appeal to the Privy Council from a decision of the High Court at Fort William, Bengal, did so. Before the board, the respondent took a preliminary objection as to the competency of the appeal. The Judicial Committee upheld the objection and dismissed the appeal. James LJ, who delivered the advice of the board observed (at p 207):

> The appeal is brought in violation of good faith, and their Lordships feel that they ought not to entertain an appeal so brought where the real merits of the case have been withdrawn from the court below.

Other cases where the principle was applied include *Anant Das v Ashburner & Co* (1876) ILR 1 All 267, *Protap Chunder Dass v Arathoon* (1882) ILR 8 Cal 455, *Rameshwardas v New Jooria Bazar Sugar Co* AIR 1926 Sind 202 and *Kedarnath v Sitaram* AIR 1969 Bom 221.

I think it is beyond argument that a right of appeal, though a creature of statute, is a substantive right. See *Lim Phin Khian v Kho Su Ming* [1996] 1 MLJ 1. It is equally beyond argument that like any other valuable right, it may form the subject matter of a contract and may be bargained away. Actual or potential litigants may therefore agree that the decision of a court of first instance shall be final and that neither of them shall appeal against it. This is entirely in keeping with the doctrines of freedom and sanctity of contract.

Before us, counsel for the appellant did not seek to argue that the agreement housed in para A(13) of his client's letter is void and unenforceable. I do not think that it was open for him to do so in the face of the authorities upon the subject.

In the circumstances, the application for stay could not be countenanced by this court. It was dismissed with costs.

The President of the Court of Appeal and my learned brother Ahmad Fairuz JCA have seen this judgment in draft and agree with the reasoning and the conclusions therein.

Application dismissed.

Reported by David Lai